

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.263 of 1996

Reserved on: August 07, 2007

Decided on: September 18, 2007.

Tarsem Lal

.....Appellant.

VERSUS

Gujjar Singh & Anr.

.....Respondents.

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?¹ No

For the Appellant: Mr.H.K.Bhardwaj, Advocate.

**For the Respondents: Mr. K. D. Sood, Advocate for
respondent No.1.**

Kuldip Singh, Judge

Appellant - plaintiff No.2 Tarsem Lal is in appeal against the judgment and decree dated 29.4.1996 passed by learned District Judge, Una in Civil Appeal No.53 of 1992 dismissing the appeal.

2. The facts, in brief, are that proforma respondent No.2 Ram Dass and appellant Tarsem Lal filed a suit for possession of land measuring 10 Kanals 7 Marlas alleging that suit land was mortgaged by their ancestors to Munshi Ram who sold his mortgagee rights to Harbans Lal. The respondent No.1– defendant Gujjar Singh was inducted as tenant at will by Harbans Lal without the consent of ancestors of plaintiffs and the land was redeemed, mutation

¹ *Whether the reporters of the local papers may be allowed to see the Judgment? Yes*

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to this effect was also sanctioned in favour of the plaintiffs, but respondent No.1 refused to hand over the possession. Hence, the suit.

3. The respondent No.1 contested the suit. It was denied that plaintiffs are legal representatives of original mortgagor. It is the case of the respondent No.1 that he was inducted as non occupancy tenant on the suit land much before the purchase of mortgagee rights by Harbans Lal. In the alternative, it has been pleaded that he was inducted by mortgagee on suit land as an act of prudent management, now under the H.P. Tenancy and Land Reforms Act, he has become owner of the suit land. It has been pleaded that mutation in favour of the plaintiffs was sanctioned wrongly which is not binding on respondent No.1. The preliminary objections of maintainability, locus standi, limitation, estoppel, misjoinder, non-joinder of parties, lack of material particulars and jurisdiction of the civil Court to try the suit were also taken. The suit was dismissed by learned Sub Judge 1st Class (2), Amb on 22.4.1992. The appeal filed by plaintiffs was also dismissed by learned District Judge on 29.4.1996. Now only Tarsem Lal has filed appeal against judgment and decree dated 29.4.1996, as noticed above. The appeal has been admitted on the following substantial question of law:-

Whether the tenancy created by the mortgagee is binding on the mortgagor which is not for the better management of the property?

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4. I have heard the learned counsel for the parties and gone through the record.

5. The learned counsel for the appellant / plaintiff No.2 has submitted that proper issues were not framed by the trial Court. It was for respondent No.1 to prove that tenancy created by the mortgagee was for better management of the property which respondent No.1 has failed to prove. The Courts below have misconstrued and misinterpreted the material on record and have erred in dismissing the suit of the plaintiffs. The learned counsel for respondent No.1 has supported the impugned judgment and decree.

6. The parties right from the very beginning were aware of the real dispute between them. The pleaded case of the plaintiffs is that the suit land was mortgaged by their ancestors to Munshi Ram who sold his mortgagee rights to Harbans Lal and Harbans Lal inducted respondent No.1 as tenant at will on the suit land. The respondent No.1 in written statement has pleaded that he was inducted as non occupancy tenant much before the purchase of mortgagee rights by Harbans Lal. He has also pleaded that even if it is proved that he was inducted tenant by the mortgagee in that case also, his induction as tenant on the suit land was an act of prudent management and for the benefit of the estate. Respondent No.1 has also pleaded that earlier he was non occupancy tenant on the suit land and after the coming into force of H.P. Tenancy and Land Reforms Act he has become owner of the suit land. Thus, the parties were aware

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that the dispute is with respect to the induction of respondent No.1 as tenant on the suit land and then the claim of respondent No.1 having become owner of the suit land after coming into force of H.P. Tenancy and Land Reforms Act. The real dispute between the parties was covered by Issues No.1 and 6. It is settled law that if parties are aware of the controversy and have been given full opportunity to lead evidence then non framing of any issue is not material more particularly when no prejudice has been caused to the parties. In ***Nedunuri Kameswaramma Versus Sampati Subba Rao, [AIR 1963 SC 884]***, in Para-6, the Supreme Court has held as follows:-

“... .. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already.”

In ***Kunju Kesavan Versus M.M.Philip & Others, [AIR 1964 SC 164]***, in Para-17, the Supreme Court has held as follows:-

“... .. The parties went to trial, fully understanding the central fact whether the succession as laid down in the *Ezhava Act* applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a mis-trial sufficient to vitiate the decision.”

In ***Bhairab Chandra Nandan Versus Ranadhir Chandra Dutta, [AIR 1988 SC 396]***, in Para-6, the Supreme Court has held as follows:-

“... ..The respondent's counsel submitted that since no issue has been raised on the question of alternative accommodation being available, the appeal may be remanded to the Appellate Court for evidence being taken and a finding rendered on the question whether the house in Ismail Madan Lane would meet the requirement of the appellant. We do not find any merit in this submission. Though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the Court to the existence of another house belonging to the appellant in Ismail Madan Lane and the said house being not vacant. There is, therefore, no need for the appeal being remanded for a finding on the question whether alternate

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suitable accommodation is available for the appellant.”

In the present case, it is not the case of the appellant who was one of plaintiffs that he was not given an opportunity to lead evidence. In the grounds of appeal before the first appellate Court as well as in this Court though the grievance has been raised regarding the non framing of the proper issues but in the grounds of appeal in this Court it has not been submitted that the non framing of the issues has caused any prejudice to the appellant. The submission of the learned counsel for the appellant regarding non framing of proper issues is thus rejected.

7. A perusal of Jamabandi Ext.P-2 for the year 1953-54 would show that the suit land was in possession of mortgagee Munshi. In Ext.P-1 Jamabandi for the year 1958-59 respondent No.1 Gujjar Singh has been shown as non occupancy tenant on the suit land and Munshi Ram as mortgagee. In Jamabandi Ext.P-1 there is red ink note to the effect that mortgagee rights have been sold by Munshi Ram in favour of Harbans Lal vide mutation No.2190. In other words, Gujjar Singh respondent No.1 was inducted as tenant by Munshi Ram mortgagee before he sold his mortgagee rights to Harbans Lal. Thus it has been established that respondent No.1 Gujjar Singh was inducted non occupancy tenant by Munshi Ram Mortgagee.

8. In ***Kirpu Ram (deceased) through his LRs versus Kanshi Ram (deceased) through his LRs [1992 (2) SLJ 1968]***, the question was whether the tenancy under the mortgage automatically

comes to an end with the redemption of the mortgage. In that case at the relevant time, Punjab Tenancy Act, 1887 was applicable as in the present case. The Punjab Security of Land Tenures Act, 1953 which continued to apply till the coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 was also applicable at the relevant time in that area as well as in the area where the land in the present case is situated. The Punjab Tenancy Act, 1887 and Punjab Security of Land Tenures Act were repealed by H.P. Tenancy and Land Reforms Act, 1972. As per sub-section (6) of Section 2 of the Punjab Security of Land Tenures Act, tenant would mean as it is defined in Punjab Tenancy Act, 1887.

9. This Court in ***Kirpu Ram's case*** (supra), held that a person who held the land under mortgagee and was also liable to pay rent for the land to other person, namely, mortgagee will be covered by the definition of the tenant. In the present case also, applying the principle laid down in *Kirpu Ram's case (supra)*, respondent No.1Gujjar Singh is covered by the definition of the tenant. This Court in *Kirpu Ram's case* has further held that a person inducted as a tenant by mortgagee will be deemed to be a tenant even under the provisions of H.P. Tenancy and Land Reforms Act, 1972. This being the position, the tenancy of respondent No.1 Gujjar Singh will be governed by H.P. Tenancy and Land Reforms Act and he will automatically become owner under the said Act.

10. In *Kirpu Ram's case (supra)*, it has further been held that very act of mortgagee inducting a person as tenant upon the land with a view to cultivate the land and thereby improving the fertility of the soil will be deemed to an act of prudent management. The facts in the present case are quite close to the facts in the *Kirpu Ram's case*. The two Courts below have considered the case of the parties in right perspective. The appellant has failed to make out any case for interference. The substantial question of law is answered against the appellant and in favour of respondent No.1 – defendant.

11. The result of the above discussion is that the appeal is dismissed with costs.

September 18, 2007.
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(Kuldip Singh)
Judge